

Questions for the Record from Chairman John Thune

To

Mr. Brett Schaefer

**Question 1.** *Regarding a proposed two-year delay to the transition of the IANA functions, skeptics may always have a reason to call for just a little bit more time, turning a short delay into a de facto blocking of the transition indefinitely. Can you offer some objective, concrete benchmarks or criteria that would demonstrate that the new structure has been sufficiently proven effective?*

**Answer:** I support a soft extension of the U.S. contract with ICANN. A “soft extension” would, from my perspective, involve extending the contract but modifying it to circumvent the current U.S. role of approving changes to the root zone file. However, there should be a provision for reasserting its role if things do not proceed as the ICANN community thinks that it will.

There is no specific benchmark that would signal that ICANN is ready for the transition. The value of an extension is that it would allow implementation of the new ICANN bylaws and provide the ICANN community time to explore the new governance structure in practice, rather than in theoretical stress tests. It will also provide time for all of the Work Stream 2 reforms, which are not expected to be fully resolved and implemented until the summer of 2017, to be completed and implemented. Important issues yet to be settled include the nature and extent of ICANN’s commitment to human rights, making ICANN more transparent to the community, adopting measures to make the staff more accountable, and the issue of ICANN’s jurisdiction of incorporation, which remains an issue of dispute.

NTIA opposes a test period because they see the community powers as “a safeguard and tools of last resort. As such, there is no expectation that the community will ever need to exercise these powers in the next several years; indeed, the hope is that they are never exercised. The notion of ‘testing’ these would require significant failure on behalf of ICANN that is unlikely to happen in the near future, if at all.”

I disagree. While there is no guarantee of a significant failure – and I hope one does not occur – there will be opportunities for the multi-stakeholder community to test out the new accountability mechanisms through already scheduled actions. These include approving or opposing bylaw changes related to further ICANN reforms envisioned under Work Stream 2 and working out the kinks of more mundane processes like consulting with the supporting organizations and advisory committees during the budget development process and providing notifications to the Empowered Community. The extension would maintain the option of reasserting U.S. oversight if the new community powers prove inadequate or ICANN resists promised accountability reforms sought by the ICANN community.

At the latest, I see U.S. oversight ending in 2019. The current contract cannot be extended beyond 2019 and continued U.S. oversight would require a new contract, which ICANN must enter into willingly. If ICANN fulfills its promises to the community on accountability and performs its responsibilities well, believe the multi-stakeholder community and most of the world’s countries, including the U.S., will support ICANN continuing its role absent U.S. oversight.

Questions for the Record from Senator Marco Rubio  
To  
Mr. Brett Schaefer

**Question 1.** *During the course of the CCWG's consideration of its accountability reform proposal, the U.S. Chamber and other business interests requested that ICANN's bylaws be amended to allow for greater insight into how and to what extent ICANN interacts with governments and government officials (outside the formal interaction with the GAC). This request seems especially important in the wake of the revelations concerning ICANN's most recent CEO, Fadi Chehade, and his interactions with the Chinese government before his departure in March. The CCWG delayed consideration of this important work during Work Stream 2. Do you agree that this type of transparency is important?*

**Answer:** Yes, it is critically important that an organization with the authority and resources that ICANN possesses be transparent about its interactions with all governments. ICANN discloses the information required by U.S. law, but this disclosure is not comprehensive. For instance, ICANN refuses to provide details to the ICANN community about its contracts with vendors like Albright Stonebridge Group LLC, Wiley Rein LLP, Rice Hadley Gates LLC and other entities hired to provide "education/engagement" services because of confidentiality obligations in the contracts. U.S. law would also not cover interactions between ICANN and other governments. If the ICANN community is to be in a position to hold ICANN accountable post-transition, it needs to be fully informed of its activities and interests.

**Question 2.** *Should this important work have been punted to Work Stream 2?*

**Answer:** Early on, the ICANN community identified a number of serious reforms that it deemed critical to make ICANN accountable. However, it was clear that not all of the reforms could be fully developed or implemented under the original projected deadline for the transition of September 2015. Therefore, the ICANN cross community working group on accountability divided the reforms into "Work Stream 1" reforms that had to be in place prior to the transition and "Work Stream 2" reforms that could be implemented after the transition. The difference between the two was not their importance, but whether or not they directly involved replacing the U.S. role in the IANA process. It is very unfortunate that an artificial, political deadline drove this division in ICANN reforms. In my opinion, the U.S. should have required all reforms to be implemented prior to the transition.

**Question 3.** *What assurances are there that greater transparency such as this will be effectuated if the transition was to occur before the work is done?*

**Answer:** There is a commitment to implementing Work Stream 2 reforms written into the bylaws, but it is a broad commitment that could result in significant reforms or cosmetic reforms. A major reason why the ICANN Board has been willing to accept Work Stream 1 accountability measures in the current proposal is that the U.S. government has said that the transition is dependent on their adoption. Even then, the Board has been recalcitrant at times and forced the community to retreat from reforms that it sought. After the transition, the ICANN Board will likely be less accommodating to community demands for greater accountability and transparency. We could see a similar dynamic post-transition with the community backing down in the face of Board opposition and settling for minimal reforms. Adding to this concern is the fact that ICANN has significantly curtailed the budget for independent legal advice for Work Stream 2 versus Work Stream 1. In short, there is reason to doubt that the Work Stream 2 reforms will be implemented to the level desired by the much of the ICANN community as expressed during the past two years. An extension of the contract would place the ICANN community in a much stronger position to demand full implementation of Work Stream 2 reforms.

**Question 4.** *What other issue have been punted to Work Stream 2 that you see potential problem with?*

*Answer:* Important issues yet to be settled include the nature and extent of ICANN's commitment to human rights and making ICANN more transparent to the community, which I discussed in my testimony.

More recent events have illustrated the importance of stronger accountability for the ICANN Board and staff. In a July 29 declaration, an Independent Review Panel (an arbitral panel for dispute resolution) condemned ICANN for its actions involving applications for domains by a company called Dot Registry. The panel found that ICANN legal staff inappropriately intervened in the report of an independent evaluator. Then it found that the Board Governance Committee, or BGC (the body responsible for responding to requests for reconsideration of board decisions and administering ICANN's conflict of interest policy), repeatedly failed to do its job. Its decisions were described as "cavalier" and "simply not credible."

According to the panel, "ICANN failed to apply the proper standards in the reconsiderations at issues, and that the actions and inactions of the board were inconsistent with ICANN's Articles of Incorporation and Bylaws." Specifically, the Board "failed to exercise due diligence and care," "failed to fulfill its transparency obligations," and the evidence did "not support a determination that the board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions." These are serious governance flaws that need to be addressed, but have been largely deferred to Work Stream 2.

Another issue in Work Stream 2 that could have serious implications is the issue of ICANN's jurisdiction of incorporation, which remains an issue of dispute. ICANN's bylaws state that "the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America." However, ICANN's principal office and place of incorporation can be changed and some participants in the Work Stream 2 discussions have been very vocal in their desire to move ICANN out of the U.S., which could have far-reaching implications.

**Question 5.** *Foreign governments have already pushed for regulatory control of the Internet by the United Nations or a governmental regime. How much will the transition be able to reverse the thinking of governments that are already in favor of this governance?*

*Answer:* Not at all. Governments like Russia, China, and Iran will always prefer more government control over the Internet. That is easiest to achieve through UN or International Telecommunication Union (ITU) governance of the Internet and they will continue to press for that outcome. That was never going to change regardless of the transition. How many governments are in this group? At the 2012 WCIT conference, 89 countries voted in favor of granting the ITU a role in Internet governance versus 55 countries that voted against the proposal.

The NTIA has argued that the transition announcement has eroded this support. In July, Assistant Secretary Strickling stated that "almost 30 of [the 89 countries supporting UN governance of the internet in 2012] have now demonstrated their support for multistakeholder governance of the domain name system by joining in the Governmental Advisory Committee's [GAC's] consensus position to move the transition proposal forward." This means that roughly 60 countries continue to oppose the multi-stakeholder model.

But more fundamentally, support for the transition proposal in the GAC does not ipso facto mean that those governments would not prefer UN governance of the Internet. It could mean that they support ending the U.S. contractual relationship with ICANN and see it as an avenue toward asserting ITU

governance of the Internet. In other words, the long-term impact of the transition on government positions vis-à-vis UN governance of the Internet is unknown.

**Question 6.** *Will a delay in the transition, to ensure accountability, push these foreign governments to abandon the multi-stakeholder model altogether or will it do more to prevent these governments from abusing it?*

*Answer:* In my opinion, it is unlikely that countries supportive of the multi-stakeholder model would abandon it. For years, the U.S. had worked with like-minded countries to resist efforts to have the International Telecommunication Union (ITU) assume a role in Internet governance. In the 2012 WCIT conference, 89 countries voted in support of a proposal to have the ITU assume some authority over the Internet. NTIA believes that the transition announcement convinced some 30 countries to reconsider their position. However, 54 countries voted with the U.S. at the WCIT to oppose the proposal to have the ITU assume some authority over the Internet. As far as I know, there has been no significant shift in the position of countries that support of the multi-stakeholder model since the WCIT. If the U.S. said that it remained committed to the transition, but wanted more time to fully vet the proposal, I believe that these countries would remain supportive of the multi-stakeholder model.